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Supreme Court, U.S.
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No. 96-513

In The

Supreme Court of the United States

October Term, 1996

V-1 OIL COMPANY, an Idaho Corporation,

Petitioners,

vs.

IDAHO PETROLEUM CLEAN WATER TRUST FUND,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Idaho

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI

ALAN G. LANCE
Attorney General of Idaho

MARGARET R. HUGHES
Counsel of Record
MICHAEL S. GILMORE
Deputy Attorneys General
Statehouse
Boise, Idaho 83720
Telephone: (208) 334-2400

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. When the constitutionality of a state tax is challenged solely under the state constitution, and the state supreme court holds that the collection of the tax is legal under the state constitution, but that the money collected must, under the state constitution, be appropriated in a different manner than previously appropriated, does the Federal Constitution, nevertheless, require that there be a refund of the state tax previously paid?

2. When a state supreme court decides, as a matter of state constitutional or common law, that a plaintiff is not entitled to a tax refund of a state tax legally collected under the state constitution, and the plaintiff had the opportunity to brief on appeal the legal issue of entitlement to a tax refund, and did so in its petition for rehearing, are the plaintiff's federal due process rights violated?

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* This citation was unavailable when the petition for certiorari was filed.

STATUTORY AND RULE PROVISIONS

Article VII, section 17 of the Idaho Constitution is set out in App. I to Petition, p. 110a. Idaho Code § 1-205 is set out below:

1-205. Disposition of appeals.

> The court may reverse, affirm or modify any order or judgment appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. . . . [I]f a new trial be granted, the court shall pass upon and determine all the questions of law involved in the case presented upon such appeal, and necessary to the final determination of the case.

STATEMENT OF THE CASE

Factual and Procedural Background

The Idaho Constitution, article VII, section 17, requires all taxes "on gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways" to be used exclusively for highway-related purposes. Believing that this provision did not apply to levies on storage of petroleum products, in 1990 the Idaho Legislature created the Idaho Petroleum Clean Water Trust Fund (the "Fund"), which was financed by a one-cent per gallon fee on stored petroleum products. Petitioner V-1 Oil Company, a distributor of petroleum products, challenged the funding mechanism as violating the Idaho Constitution. Petitioner did not (nor could it) challenge the fee under federal law. In its opinion issued

August 3, 1995, the Idaho Supreme Court held that the Idaho Legislature had the authority to "assess and collect the fee at issue in this appeal," App. C to Petition, p. 41a, n.2, but that the proceeds had to be dedicated to the purposes set forth in article VII, section 17 of the Idaho Constitution, *id.* at p. 41a. Respondent, the Fund, sought rehearing, and rehearing was granted. Petitioner did not seek rehearing on the issue of whether the collection of the tax itself was legal or the consequences of this holding. Rehearing was granted and oral argument was held on December 11, 1995.

On April 16, 1996, the Idaho Supreme Court issued a substitute opinion, holding that because the *collection* of the tax did not violate the Idaho Constitution, as a matter of law, Petitioner was not entitled to a refund. The Idaho Supreme Court further held that while the collection of the tax was legal, the proceeds had to be appropriated in a manner consistent with article VII, section 17 of the Idaho Constitution. App. B to Petition, p. 29a. At this point, both parties petitioned for rehearing. Respondent asked the court to clarify whether its ruling regarding the appropriation of the funds was to be applied prospectively or retroactively. Petitioner asked the court to change its ruling on the refund issue and provided the court with extensive briefing regarding what it considered to be errors in the court's analysis. App. G to Petition, pp. 81a-96a.

On July 2, 1996, the Idaho Supreme Court issued another substitute opinion. *V-1 Oil Co. v. Idaho Petroleum Clean Water Trust Fund*, ___ Idaho ___, 920 P.2d 909 (1996). The court adhered to its view that Petitioner was not, as a matter of law, entitled to a refund, because the collection

of the tax, as opposed to its appropriation, did not violate the Idaho Constitution. App. A to Petition, p. 12a. The court further held that due to the reliance on the challenged statute by the Executive Department and the reliance on the insurance program by hundreds of individuals and companies in Idaho, the court would apply its holding in a modified prospective fashion, consistent with its precedent in a recent case asking for refunds of state taxes under state law, so that all monies collected after August 3, 1995, had to be appropriated consistently with the Idaho Constitution, but monies transferred to Respondent before then could be retained.[1] From this holding under state law, Petitioner attempts to fashion a federal claim.

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[1] The state tax case cited was *Potlatch Corp. v. Idaho State Tax Comm'n*, 120 Idaho 1, 2-3, 813 P.2d 340, 341-42 (1991) (court held that its interpretation of production exemption for state sales and use tax that overruled previous case decision and intervening practices of State Tax Commission inconsistent with the new rule of law would be given modified prospective application). The Idaho Supreme Court also cited two other cases, *Rogers v. Yellowstone Park Co.*, 97 Idaho 14, 25-26, 539 P.2d 566, 577-78 (1975) (decision overruling common law doctrine of interspousal tort immunity given modified prospective application), and *Baker v. Shavers, Inc.*, 117 Idaho 696, 697, 791 P.2d 1275, 1276 (1990) (decision overruling common law doctrine of open and obvious danger given modified prospective ruling), in support of its holding for modified prospective relief with regard to the remedy that monies previously collected could be retained up to the time of the court's decision, but had to be appropriated consistently with the state constitution from that time forward.

REASONS FOR DENYING PETITION

1. No Substantial Federal Question Is Presented

Petitioner has attempted to fashion a federal question where clearly none exists. The tax at issue was challenged solely on state grounds. The tax itself was held to be legal under the state constitution, with the state supreme court concluding that only the appropriation of the tax revenues ran afoul of the state constitution. This holding simply does not implicate a federal question. "[T]he construction that a state court gives a state statute is not a matter subject to our review." *New York v. Ferber*, 458 U.S. 747, 767, 102 S. Ct. 3348, 3360, 73 L. Ed. 2d 1113 (1982). "[S]tate courts are the ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S. Ct. 1881, 1886, 44 L. Ed. 2d 508 (1975).

However, in an attempt to create a federal issue where none exists, Petitioner relies on this Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990), a case in which the Court addressed a state tax unconstitutional under the Commerce Clause, for the remarkable proposition that whenever a state tax is declared illegal, the federal due process clause mandates a refund. This is a grossly exaggerated reading of *McKesson*.

McKesson involved a challenge to a state excise tax as discriminating between intrastate and interstate commerce under the Federal Commerce Clause. The tax collection itself was invalidated as being discriminatory.

This Court held that the Due Process Clause of the Fourteenth Amendment obligated the state to provide meaningful "backward-looking relief" to rectify a tax collection that violated the Federal Constitution. *Id.* at 31, 110 S. Ct. at 2247.[2]

McKesson, its predecessors and its progeny are inapposite here. As a preliminary matter, *McKesson* was based on a challenge brought under the Federal Constitution. Here, no federal challenge was ever made to the tax at issue. It was challenged solely on state law grounds, and no federal rights are involved. This Court has never held

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[2] The Court gave the following examples of some allowable procedures for a tax remedy:

> The State might, for example, [1] provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint; [2] execute any refunds on a reasonable installment basis; [3] enforce relatively short statutes of limitations applicable to such actions; [4] refrain from collecting taxes pursuant to a scheme that has been declared invalid by a court or other competent tribunal pending further review of such declaration on appeal; and/or [5] place challenged tax payments into an escrow account or employ other accounting devices such that the State can predict with greater accuracy the availability of undisputed treasury funds.

496 U.S. at 45, 110 S. Ct. at 2254-55 (footnote omitted). The Idaho Supreme Court's remedy was consistent with the fourth remedy of the examples: The Idaho Supreme Court provided that taxes collected under the challenged scheme, which were not collected unconstitutionally, would have to be appropriated consistently with the constitution from the date that their previous appropriation was declared unconstitutional by the Idaho Supreme Court.

that, under the Federal Due Process Clause, when a state tax is declared to violate a state constitution, a refund is required. To the contrary, the same day *McKesson* was decided, this Court issued another tax opinion, *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 177, 110 S. Ct. 2323, 2330, 110 L. Ed. 2d 148 (1990), in which it held that "when questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions" and, further, "we think the Federal Constitution has no voice upon the subject of whether a state court may decline to give its decisions retroactive effect," quoting *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S. Ct. 145, 148, 77 L. Ed. 360 (1932).

More importantly, unlike *McKesson*, the tax collection at issue here was never held to be illegal. Rather, the Idaho Supreme Court held that moneys validly collected had not been appropriated in a manner consistent with the Idaho Constitution. This is very different from *McKesson*, where it was the discriminatory collection itself that violated the law. Petitioner seeks to avoid this important distinction by arguing that the Idaho Supreme Court's ruling on the refund issue and prospective application issue is contrary to several Idaho statutes and constitutional provisions. Petition, pp. 19-23. However, the Idaho Supreme Court, not Petitioner, has the final word on interpreting Idaho law. *Ferber* and *Mullaney*, *supra*. The Idaho Supreme Court was asked to determine whether a state tax violated the state constitution, and it concluded, solely under state law, that the tax itself was constitutional, but the subsequent appropriation of the monies was not. Because the tax itself is legal, the

McKesson holding, which applies to deprivations of property unconstitutional under federal law, not appropriation of tax revenues unconstitutional under state law, is simply irrelevant to this case.[3]

2. Petitioner Received Due Process

Petitioner, in a second attempt to fashion a federal question, argues that it did not receive due process because the Idaho Supreme Court *"sua sponte"* raised the refund question without giving Petitioner an opportunity to brief or argue that legal issue. Here, Petitioner has simply mischaracterized the record.

The Idaho Supreme Court was asked to determine whether the one-cent per gallon charge on stored petroleum products, used to finance the Fund's insurance program for petroleum storage tanks, violated the state constitution. From the outset, the court held the tax was constitutional. In its first opinion, issued August 3, 1995, the court stated the legislature was authorized to assess and collect the tax at issue. App. C to Petition, p. 41a, n.2. Under this holding, it should have been apparent Petitioner was not necessarily entitled to a refund.

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[3] The other cases cited by Petitioner – *Atchison, T. & S.F.R.R. Co. v. O'Connor*, 223 U.S. 280, 32 S. Ct. 216, 56 L. Ed. 436 (1912), *Ward v. Love County Board of Comm'rs*, 253 U.S. 17, 40 S. Ct. 419, 64 L. Ed. 751 (1920), and *Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499, 48 S. Ct. 331, 72 L. Ed. 673 (1928) – also were decided under claims of violation of the Interstate or Indian Commerce Clauses. None involved a claim of violation of state law.

Nevertheless, Petitioner did not, at this point, seek a rehearing for clarification. However, Respondent, the Fund, did seek rehearing, which was granted. At this hearing, Petitioner clearly had an opportunity to discuss the refund issue with the Idaho Supreme Court and address its concerns. On April 16, 1996, the court issued a substitute opinion, clarifying that Petitioner was not, as a matter of law, entitled to a refund.[4] Once this opinion was issued, Petitioner sought rehearing and submitted an extensive brief to the Court, thoroughly discussing why it believed it was entitled to the refund. App. G to Petition, pp. 81a-96a. Respondent also submitted a brief in support

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[4] It is the established practice, as required by Idaho Code § 1-205, for the Idaho Supreme Court to pass upon questions that the lower court must reach after the case is remanded. E.g., *State v. Seitter*, 127 Idaho 356, 359, 900 P.2d 1367, 1370 (1996) ("we address the instruction issue because it is a question of law which may arise again during the new trial, and it is necessary to a final determination of the case"); *State v. Wengren*, 126 Idaho 662, 669, 889 P.2d 96, 103 (Ct. App. 1995) ("The longstanding rule of this Court is that we will not consider issues that are presented for the first time on appeal. The exception to this rule is that the constitutional issues may be considered for the first time on appeal if such consideration is necessary for subsequent proceedings in the case.") (citations and internal punctuation omitted), citing *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992), *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991), and *Messmer v. Ker*, 96 Idaho 75, 78, 524 P.2d 536, 539 (1974). There is no basis for Petitioner to argue that "ruling on the refund/relief issue was reserved for the trial court." Petition for Certiorari, p. 17. Nor is there any basis for Petitioner's assertion at pp. 17-18 that the Idaho Supreme Court does not address issues not raised before the trial court. In circumstances like this, the Idaho Supreme Court will often address such issues.

of a petition for rehearing, asking the court to apply its holding regarding the appropriations of the moneys prospectively. The Idaho Supreme Court clearly reviewed these briefs as it issued a second substitute opinion on July 2, 1996. It agreed to apply its holding in a modified prospective fashion, but adhered to its conclusion that Petitioner was not, as a matter of law, entitled to a refund.

Petitioner's assertion that it never was given the opportunity to argue or brief the refund issue is patently false. The refund question was always a subsidiary issue in this case, and it was extensively briefed by Petitioner in its brief supporting its petition for rehearing.

Further, it is simply not credible for Petitioner to assert this issue was raised *sua sponte* by the court. The court, in concluding the tax was legal, but the appropriation was not, was clearly faced with the follow-up question of what the proper remedy should be. It does not violate due process for a state appellate court, in interpreting the law, to also decide how its new rule shall apply and what remedies will be afforded the parties under the rule. See n.4, *supra*.

Likewise, Petitioner is in error when it asserts the refund issue should have been remanded for a factual determination. Had the Idaho Supreme Court determined a refund was appropriate because the tax itself was illegal, a remand for a factual determination of whether the tax was paid under protest and how much was paid would have been in order. But where, as here, the Idaho Supreme Court held as a matter of law that Petitioner was not entitled to a refund because the tax was legal, there

was no reason to remand for a factual determination, and the failure to do so did not violate due process.

Finally, Petitioner concludes its due process section by arguing the Idaho Supreme Court's holding was simply incorrect under various Idaho Constitutional provisions and statutes. Petition, pp. 19-23. These arguments were made to the Idaho Supreme Court in Petitioner's brief supporting a rehearing and were clearly rejected. Petitioner may disagree with the Idaho Supreme Court's construction of Idaho law, but that does not create a due process issue under the Federal Constitution. *Ferber* and *Mullaney, supra.*

In short, Petitioner has distorted the record to create a due process issue and, thereby, the necessary federal question for its petition for writ of certiorari to be granted. However, there was no due process violation here, and this petition should be rejected.

CONCLUSION

For the foregoing reasons, Respondent asks that this Petition be denied.

Respectfully submitted,

ALAN G. LANCE
Attorney General of Idaho

MARGARET R. HUGHES
Counsel of Record
MICHAEL S. GILMORE
Deputy Attorneys General
Statehouse
Boise, Idaho 83720
Telephone: (208) 334-2400